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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/797,981	03/11/2004	Dennis Eugene Kuhlman	9576	4999

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EXAMINER

MAHYERA, TRISTAN J

ART UNIT	PAPER NUMBER
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1615

MAIL DATE	DELIVERY MODE
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03/27/2008

PAPER

Please find below and/or attached an Office communication concerning this application or proceeding.

The time period for reply, if any, is set in the attached communication.

Office Action Summary

Application No.

10/797,981

Applicant(s)

KUHLMAN ET AL.

Examiner

TRISTAN J. MAHYERA

Art Unit

1615

Period for Reply -- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

- 1) ☒ Responsive to communication(s) filed on 12 December 2007.
- 2a) ☐ This action is **FINAL**. 2b) ☒ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

- 4) ☒ Claim(s) 1-10 and 15-19 is/are pending in the application.
- 4a) Of the above claim(s) _____ is/are withdrawn from consideration.
- 5) ☐ Claim(s) _____ is/are allowed.
- 6) ☒ Claim(s) 1-10 and 15-19 is/are rejected.
- 7) ☒ Claim(s) 7 and 10 is/are objected to.
- 8) ☐ Claim(s) _____ are subject to restriction and/or election requirement.

Application Papers

- 9) ☒ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on _____ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.
- Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
- Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

Priority under 35 U.S.C. § 119

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some * c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
 2. ☐ Certified copies of the priority documents have been received in Application No. _____.
 3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

* See the attached detailed Office action for a list of the certified copies not received.

Attachment(s)

- 1) ☒ Notice of References Cited (PTO-892)
- 2) ☐ Notice of Draftsperson's Patent Drawing Review (PTO-948)
- 3) ☐ Information Disclosure Statement(s) (PTO/SB-08)
Paper No(s)/Mail Date _____
- 4) ☐ Interview Summary (PTO-413)
Paper No(s)/Mail Date _____
- 5) ☐ Notice of Informal Patent Application
- 6) ☐ Other: _____

DETAILED ACTION

Applicant's arguments have been fully considered and are rendered moot in view of the new rejections.

Specification

The disclosure is objected to because of the following informalities: The use of the trademarks BRIJ, PERFORMATHOX, GLUCAMATE, CROTHIX, CARBOPOL, CARBOPOL AQUA, CARBOPOL ULTREZ, PEMULEN, STABYLEN, STABILEZE, MIRANOL, ALKATERIC, AMPHOTEGE, MONATERIC, REWOTERIC, SCHERCOTERIC, FLORABEADS, PEARL and LIPOPEARL have been noted in this application. They should be capitalized wherever the mark appears and be accompanied by the generic terminology.

Although the use of trademarks is permissible in patent applications, the proprietary nature of the marks should be respected and every effort made to prevent their use in any manner which might adversely affect their validity as trademarks.

Appropriate correction is required.

Claim Objections

Claim 7 is objected to under 37 CFR 1.75(c), as being of improper dependent form for failing to further limit the subject matter of a previous claim. Applicant is required to cancel the claim(s), or amend the claim(s) to place the claim(s) in proper dependent form, or rewrite the claim(s) in independent form. Claim 7 depends from claim 1 and states "the cross linked copolymer is selected from the group consisting of

cross-linked acid copolymers..." which fails to further limit the "cross-linked acid copolymer" of claim 1. Furthermore, claim 7 broadens the scope of coverage with the phrase "cross linked copolymer", which implies all cross-linked copolymers, acid or not.

Claim 10 is objected to under 37 CFR 1.75(c), as being of improper dependent form for failing to further limit the subject matter of a previous claim. Applicant is required to cancel the claim(s), or amend the claim(s) to place the claim(s) in proper dependent form, or rewrite the claim(s) in independent form. The claim states that the particulate materials are "derived from inorganic, organic, natural and synthetic sources", which does not further limit claim 1.

Claim Rejections - 35 USC § 112

The following is a quotation of the second paragraph of 35 U.S.C. 112:

The specification shall conclude with one or more claims particularly pointing out and distinctly claiming the subject matter which the applicant regards as his invention.

Claims 6, 8 and 10 are rejected under 35 U.S.C. 112, second paragraph, as being indefinite for failing to particularly point out and distinctly claim the subject matter which applicant regards as the invention.

Claim 6 is rejected as being indefinite for failing to particularly point out the metes and bounds of the claim. The phrase "greater than about 40" renders the claim indefinite because it simultaneously claims two different ranges. The phrase "greater than about 40" is not defined by the claim nor does the specification provide a standard for ascertaining the requisite metes and bounds, thus one of ordinary skill in the art would not be reasonably apprised of the scope of the invention. The phrase "greater

than" typically indicates a minimum point. However, the phrase "greater than" is controverted by the term "about", which implies that values above and below 40 are permitted. Further, the extent of variance permitted by "about" is unclear in the context. Thus, the interpretation of the phrase "at least about" in this context is unclear as no definitive minimum can be defined.

Claim 8 is rejected as failing to define the invention because it is unclear what applicant is trying to claim. The structure which goes to make up the device must be clearly and positively specified. The structure must be organized and correlated in such a manner as to present a complete composition.

Claim 10 is rejected as being indefinite for failing to particularly point out and distinctly claim the subject matter which applicant regards as the invention. The claim does not limit the invention in any meaningful manner. The particulate materials have not been distinctly claimed with any particularity when the claim states the materials are "derived from inorganic, organic, natural and synthetic sources".

Claim Rejections - 35 USC § 102

The following is a quotation of the appropriate paragraphs of 35 U.S.C. 102 that form the basis for the rejections under this section made in this Office action:

A person shall be entitled to a patent unless –

(b) the invention was patented or described in a printed publication in this or a foreign country or in public use or on sale in this country, more than one year prior to the date of application for patent in the United States.

Claims 1-3, 5, 7, 10 and 19 are rejected under 35 U.S.C. 102(b) as being anticipated by DATE et al. (US 5,674,509 see PTO-1449).

DATE teaches a skin care composition. The reference teaches a composition comprising steareth-100, a mono-alkyl substituted alkyl ethoxylated polymer having more than 40 moles of ethylene oxide. See e.g. Example 1; instant claims 1-3 and 5. The steareth-100 is taught at 0.1%(Examples 1-2 and 6-7) and 0.15%(Examples 3-5 and 8-10). The composition includes CARBOPOL 1342 and 951, cross linked copolymers, at 0.185% combined. See e.g. Example 1; instant claims 1 and 7. The particulate material is e.g. dimethicone at 3.3%. See e.g. Example 1; instant claims 1 and 10. The lathering surfactant is ARLATONE 2121(sucrose cocoate and sorbitan stearate) in Example 1 at 6%. See e.g. Example 1; instant claim 1.

The reference is silent with respect to a BYV greater than about 50 dyn/cm sq. Applicants' composition, as claimed, is the same as the prior art. As claimed, Applicants' composition contains the same components in the same configuration as the prior art. Properties are the same when the structure and composition are the same. Thus, burden shifts to applicant to show unexpected results, by declaration or otherwise. *In re Fitzgerald*, 205 USPQ 594. In the alternative, the claimed properties would have been present once the composition was employed in its intended use. *In re Best*, 195 USPQ 433; instant claim 19.

Claim Rejections - 35 USC § 103

The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the

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invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

The factual inquiries set forth in *Graham v. John Deere Co.*, 383 U.S. 1, 148 USPQ 459 (1966), that are applied for establishing a background for determining obviousness under 35 U.S.C. 103(a) are summarized as follows:

1. Determining the scope and contents of the prior art.
2. Ascertaining the differences between the prior art and the claims at issue.
3. Resolving the level of ordinary skill in the pertinent art.
4. Considering objective evidence present in the application indicating obviousness or nonobviousness.

This application currently names joint inventors. In considering patentability of the claims under 35 U.S.C. 103(a), the examiner presumes that the subject matter of the various claims was commonly owned at the time any inventions covered therein were made absent any evidence to the contrary. Applicant is advised of the obligation under 37 CFR 1.56 to point out the inventor and invention dates of each claim that was not commonly owned at the time a later invention was made in order for the examiner to consider the applicability of 35 U.S.C. 103(c) and potential 35 U.S.C. 102(e), (f) or (g) prior art under 35 U.S.C. 103(a).

Claims 1 and 9 are rejected under 35 U.S.C. 103(a) as being unpatentable over DATE et al. (US 5,674,509 see PTO-1449) in view of NOVEON (CASF1-021 "Carbopol Aqua SF-1 Polymer" Dec. 2000 edition) evidenced by PATEL (US 6,846,785 see PTO-892).

DATE teaches a skin care composition, as described above.

DATE does not teach the use of the specific alkali swellable acrylate copolymer.

NOVEON teaches the copolymer CARBOPOL AQUA SF-1 for use in clear baby shampoo formulations. The weight % of SF-1 is 5.0%. See e.g. page 1; instant claims 1 and 9. The reference teaches that SF-1 is useful to thicken nonionic surfactants, stabilize suspensions, retain clean formulations and enhance pearlescent formulations. See e.g. page 1 and page 2 last paragraph. The BYV (dyne/cm sq) of the formulation is about 30-50. See e.g. properties page 2.

PATEL teaches that CARBOPOL AQUA SF-1 is alkali swellable. See e.g. col 4 line 59 to col 5 line 6.

It would have been obvious to a person of ordinary skill in the art at the time the invention was made to make a cleaning composition comprising alkali swellable cross linked copolymers, as taught by DATE in view of NOVEON. One of ordinary skill in the art at the time the invention was made would have been motivated to combine these elements into a single composition because of the beneficial effects of CARBOPOL AQUA SF-1 in cleaning compositions as taught by NOVEON. Absent any evidence to the contrary, and based upon the teachings of the prior art, there would have been a reasonable expectation of success in practicing the instantly claimed invention.

Claims 1, 4, 6 and 8 are rejected under 35 U.S.C. 103(a) as being unpatentable over DATE in view of MCKELVEY et al. (US 6,589,517 see PTO-892 dated 9/28/2007).

DATE teaches skin care compositions, as described above. Note that the teaching of DATE read on claims 6 and 8.

DATE does not exemplify di or tri substituted alkyl ethoxylated polymers.

MCKELVEY teaches hair care compositions. MCKELVEY teaches the use of alkyl ethoxylates that may be branched, linear, saturated or unsaturated. See e.g. col 13 line 44 to col 45 line 18. The named di- tri- and tetra- alkyl substituted ethoxylated polymers are GLUCAMATE 120, CROTHIX, PEG-75 dioleate, PEG 120 methyl glucoside dioleate and PEG 150 distearate. See e.g. col 4 lines 53-63; instant claim 4. MCKELVEY teaches that these polymers are beneficial as thickeners in hair care compositions.

It would have been obvious to a person of ordinary skill in the art at the time the invention was made to make a cleaning composition comprising di- and tri-alkyl substituted ethoxylated polymers, as taught by DATE in view of MCKELVEY. One of ordinary skill in the art at the time the invention was made would have been motivated to combine these elements into a single composition because MCKELVEY is in the hair composition art and exemplifies that any of the mono- di- or tri- alkyl substituted ethoxylated polymers are beneficial as thickeners in hair compositions. Absent any evidence to the contrary, and based upon the teachings of the prior art, there would have been a reasonable expectation of success in practicing the instantly claimed invention.

Claims 1 and 15-18 are rejected under 35 U.S.C. 103(a) as being unpatentable over DATE in view of FAIR et al. (US 5,869,441 see PTO-892).

DATE teaches skin compositions, as described above.

DATE does not exemplify the lather volume of the composition or the ratio of anionic surfactants to amphoteric/zwitterionic surfactants from about 1.5:1 to about 1:3.

FAIR teaches compositions that increase the lather through the use of anionic and zwitterionic lathering surfactants. The anionic surfactants are sulfonates and isethionates. See e.g. col 5 lines 5-11 and col 6 lines 6-16; instant claim 18. The ratio of anionic to zwitterionic lathering surfactants can be calculated from claim 1 wherein the anionic surfactant is present from 1-40% and the amphoteric/zwitterionic surfactant is present from 1-20%. See e.g. claim 1; instant claim 17. The lather volume is dependant on the presence of the anionic surfactant and the amphoteric/zwitterionic surfactants which can be balanced and adjusted depending on the other components and lathering volumes of over 200 ml can be achieved. See e.g. table 4; instant claim 15. While FAIR does not explicitly teach all the instant claimed ratios, it is the position of the Examiner that it would have been obvious to one of ordinary skill in the art at the time the invention was made to determine suitable ratios of anionic and amphoteric/zwitterionic surfactants through routine or manipulative experimentation to obtain the best possible results, as these are variable parameters attainable within the art. Moreover, generally, differences in concentration, such as the ratio between the surfactants will not support the patentability of subject matter encompassed by the prior art unless there is evidence indicating such concentration is critical. "[W]here the general conditions of a claim are disclosed in the prior art, it is not inventive to discover the optimum or workable ranges by routine experimentation." *In re Aller*, 220 F.2d 454, 456; 105 USPQ 233, 235 (CCPA 1955). Applicants have not demonstrated any unexpected or unusual results, which accrue from the instant percentage ranges.

It would have been obvious to a person of ordinary skill in the art at the time the invention was made to make a foaming cleaning composition comprising anionic and amphoteric/zwitterionic lathering surfactants, as taught by DATE in view of FAIR. One of ordinary skill in the art at the time the invention was made would have been motivated to combine these elements into a single composition because of the benefits of increasing the lather in a skin cleaning composition by using a combination of both anionic and amphoteric/zwitterionic surfactants as taught by FAIR. Absent any evidence to the contrary, and based upon the teachings of the prior art, there would have been a reasonable expectation of success in practicing the instantly claimed invention.

Conclusion

Any inquiry concerning this communication or earlier communications from the examiner should be directed to TRISTAN J. MAHYERA whose telephone number is 571-270-1562. The examiner can normally be reached on Monday through Thursday 9am-4pm EST.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, MICHAEL P. WOODWARD can be reached on 571-272-8373. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free). If you would like assistance from a USPTO Customer Service Representative or access to the automated information system, call 800-786-9199 (IN USA OR CANADA) or 571-272-1000.

/Tristan J Mahyera/
Examiner, Art Unit 1615

/Michael P Woodward/
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